

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

ROGER HULL,  
#68989

Plaintiff,

vs.

STATE OF NEVADA, *et al.*,

Defendants.

3:10-cv-0260-ECR-RAM

**ORDER**

This is a prisoner civil rights action filed pursuant to 42 U.S.C. § 1983. The court now reviews the complaint.

**I. Screening Standard**

Pursuant to the Prisoner Litigation Reform Act (PLRA), federal courts must dismiss a prisoner's claims, "if the allegation of poverty is untrue," or if the action "is frivolous or malicious," "fails to state a claim on which relief may be granted," or "seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2). A claim is legally frivolous when it lacks an arguable basis either in law or in fact. *Nietzke v. Williams*, 490 U.S. 319, 325 (1989). The court may, therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless. *Id.* at 327. The critical inquiry is whether a

1 constitutional claim, however inartfully pleaded, has an arguable legal and factual basis. *See Jackson*  
2 *v. Arizona*, 885 F.2d 639, 640 (9<sup>th</sup> Cir. 1989).

3 Dismissal of a complaint for failure to state a claim upon which relief may be granted is  
4 provided for in Federal Rule of Civil Procedure 12(b)(6), and the court applies the same standard under  
5 Section 1915(e)(2) when reviewing the adequacy of a complaint or amended complaint. Review under  
6 Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Laboratory Corp. of America*,  
7 232 F.3d 719, 723 (9th Cir. 2000). A complaint must contain more than a “formulaic recitation of the  
8 elements of a cause of action;” it must contain factual allegations sufficient to “raise a right to relief  
9 above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965  
10 (2007). “The pleading must contain something more...than...a statement of facts that merely creates a  
11 suspicion [of] a legally cognizable right of action.” *Id.* In reviewing a complaint under this standard, the  
12 court must accept as true the allegations of the complaint in question, *Hospital Bldg. Co. v. Rex Hospital*  
13 *Trustees*, 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to plaintiff and  
14 resolve all doubts in the plaintiff’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

15 Allegations in a *pro se* complaint are held to less stringent standards than formal pleadings  
16 drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520-21  
17 (1972) (*per curiam*); *see also Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). All  
18 or part of a complaint filed by a prisoner may be dismissed *sua sponte*, however, if the prisoner’s claims  
19 lack an arguable basis either in law or in fact. This includes claims based on legal conclusions that are  
20 untenable (*e.g.* claims against defendants who are immune from suit or claims of infringement of a legal  
21 interest which clearly does not exist), as well as claims based on fanciful factual allegations (*e.g.*  
22 fantastic or delusional scenarios). *See Neitzke*, 490 U.S. at 327-28; *see also McKeever v. Block*, 932  
23 F.2d 795, 798 (9th Cir. 1991).

1 To sustain an action under section 1983, a plaintiff must show (1) that the conduct  
2 complained of was committed by a person acting under color of state law; and (2) that the conduct  
3 deprived the plaintiff of a federal constitutional or statutory right.” *Hydrick v. Hunter*, 466 F.3d 676, 689  
4 (9<sup>th</sup> Cir. 2006).

## 5 **II. Instant Complaint**

6 Plaintiff, who is incarcerated at Northern Nevada Correctional Center (“NNCC”) has sued  
7 the State of Nevada, Nevada Department of Corrections (“NDOC”) Medical Director Robert Bannister,  
8 NNCC Warden James Benedetti, and NNCC Director of Nursing John Peery, alleging deliberate  
9 indifference to his serious medical needs in violation of his Eighth Amendment rights as well as  
10 violations of his Fourteenth Amendment rights to equal protection and due process.

11 As an initial matter, while plaintiff names the State of Nevada as a defendant, states are  
12 not persons for purposes of § 1983. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 69  
13 (1997); *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989); *Doe v. Lawrence Livermore Nat’l*  
14 *Lab.*, 131 F.3d 836, 839 (9<sup>th</sup> Cir. 1997); *Hale v. Arizona*, 993 F.2d 1387, 1398 (9<sup>th</sup> Cir. 1993) (*en banc*);  
15 *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1327 (9<sup>th</sup> Cir. 1991). Section 1983 claims against  
16 states, therefore, are legally frivolous. *See Jackson v. Arizona*, 885 F.2d 639, 641 (9<sup>th</sup> Cir. 1989),  
17 superseded by statute on other grounds as stated in *Lopez v. Smith*, 203 F.3d 1122, 1130 (9<sup>th</sup> Cir. 2000)  
18 (*en banc*). Accordingly, all claims against the State of Nevada are dismissed with prejudice. The State  
19 of Nevada is dismissed from this action.

20 Further, the court notes that, “Where a particular amendment ‘provides an explicit textual  
21 source of constitutional protection’ against a particular sort of government behavior, ‘that Amendment,  
22 not the more generalized notion of “substantive due process,” must be the guide for analyzing [a  
23 plaintiff’s] claims’.” *Albright v. Oliver*, 510 U.S. 266, 273-74 (1994) (Rehnquist, C.J., for plurality)  
24 (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)). Therefore, plaintiff’s claims will be analyzed  
25 under the Eighth Amendment right to be free from cruel and unusual punishment rather any generalized  
26 notions of substantive due process under the Fourteenth Amendment, and his Fourteenth Amendment

1 due process claim, set forth in Count III, must be dismissed.

2 **A. Count I: Eighth Amendment Claims**

3 With respect to the remaining defendants, Bannister, Benedetti and Peery, plaintiff alleges  
4 that while at Lovelock Correctional Center (“LCC”) he was allowed to purchase contact lenses and lense  
5 solution, but that since his transfer to NNCC in 2009, defendants have refused to allow plaintiff to  
6 purchase contact lenses. Plaintiff claims that defendants “did not ensure that the plaintiff had a  
7 legitimate alternative, *i.e.*, a pair of glasses that allowed him to see clearly and did not cause headaches,  
8 dizziness, and nausea.” Plaintiff contends that defendants have been deliberately indifferent to his  
9 medical needs in violation of the Eighth Amendment.

10 The Eighth Amendment prohibits the imposition of cruel and unusual punishments and  
11 “embodies broad and idealistic concepts of dignity, civilized standards, humanity and decency.” *Estelle*  
12 *v. Gamble*, 429 U.S. 97, 102 (1976). A detainee or prisoner’s claim of inadequate medical care does not  
13 constitute cruel and unusual punishment unless the mistreatment rises to the level of “deliberate  
14 indifference to serious medical needs.” *Id.* at 106. The “deliberate indifference” standard involves an  
15 objective and a subjective prong. First, the alleged deprivation must be, in objective terms, “sufficiently  
16 serious.” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citing *Wilson v. Seiter*, 501 U.S. 294, 298  
17 (1991)). Second, the prison official must act with a “sufficiently culpable state of mind,” which entails  
18 more than mere negligence, but less than conduct undertaken for the very purpose of causing harm.  
19 *Farmer*, 511 U.S. at 837. A prison official does not act in a deliberately indifferent manner unless the  
20 official “knows of and disregards an excessive risk to inmate health or safety.” *Id.*

21 In applying this standard, the Ninth Circuit has held that before it can be said that a  
22 prisoner’s civil rights have been abridged, “the indifference to his medical needs must be substantial.  
23 Mere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this cause of action.”  
24 *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980), citing *Estelle*, 429 U.S. at 105-06.  
25 “[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does  
26 not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does

1 not become a constitutional violation merely because the victim is a prisoner.” *Estelle v. Gamble*, 429  
 2 U.S. at 106; *see also Anderson v. County of Kern*, 45 F.3d 1310, 1316 (9th Cir. 1995); *McGuckin v.*  
 3 *Smith*, 974 F.2d 1050, 1050 (9th Cir. 1992) (*overruled on other grounds*), *WMX Techs., Inc. v. Miller*,  
 4 104 F.3d 1133, 1136 (9th Cir. 1997)(en banc). Even gross negligence is insufficient to establish  
 5 deliberate indifference to serious medical needs. *See Wood v. Housewright*, 900 F.2d 1332, 1334 (9th  
 6 Cir. 1990). A prisoner’s mere disagreement with diagnosis or treatment does not support a claim of  
 7 deliberate indifference. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989).

8 Delay of, or interference with, medical treatment can also amount to deliberate  
 9 indifference. *See Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006); *Clement v. Gomez*, 298 F.3d 898,  
 10 905 (9th Cir. 2002); *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002); *Lopez v. Smith*, 203 F.3d 1122,  
 11 1131 (9th Cir. 1996); *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996); *McGuckin v. Smith*, 974 F.2d  
 12 1050, 1059 (9th Cir. 1992) *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133,  
 13 (9th Cir. 1997) (en banc); *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988). Where the  
 14 prisoner is alleging that delay of medical treatment evinces deliberate indifference, however, the prisoner  
 15 must show that the delay led to further injury. *See Hallett*, 296 F.3d at 745-46; *McGuckin*, 974 F.2d at  
 16 1060; *Shapley v. Nev. Bd. Of State Prison Comm’rs*, 766 F.2d 404, 407 (9th Cir. 1985) (per curiam).  
 17 Plaintiff alleges that defendant medical personnel have refused to allow him to purchase contact lenses  
 18 or to provide eyeglasses that do not cause blurry vision, headaches, dizziness and nausea. Plaintiff states  
 19 an Eighth Amendment claim.

## 20 **B. Count II: Fourteenth Amendment Right to Equal Protection**

21 Plaintiff also alleges that defendants “have failed to treat the plaintiff equally to other  
 22 similarly situated inmates” in violation of the Fourteenth Amendment. Plaintiff appears to base this  
 23 claim on his allegation that while incarcerated at LCC, he and other prisoners were allowed to purchase  
 24 contact lenses, but defendants have not allowed him to do the same at NNCC.

25 “Prisoners are protected under the Equal Protection Clause of the Fourteenth Amendment  
 26 from invidious discrimination based on race.” *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). Prisoners

1 are also protected by the Equal Protection Clause from intentional discrimination on the basis of their  
2 religion. *See Freeman v. Arpaio*, 125 F.3d 732, 737 (9<sup>th</sup> Cir. 1997). To establish a violation of the Equal  
3 Protection Clause, the prisoner must present evidence of discriminatory intent. *See Washington v. Davis*,  
4 426 U.S. 229, 239-40 (1976). Plaintiff has not alleged that defendants intentionally discriminated  
5 against him based on race or religion or his membership in any other protected class. Therefore,  
6 plaintiff's Fourteenth Amendment Equal Protection claim is dismissed.

### 7 **III. Conclusion**

8 **IT IS THEREFORE ORDERED** that the Clerk of Court shall detach and **FILE** the  
9 complaint (Docket #1, Exhibit B).

10 **IT IS FURTHER ORDERED** that all claims against the State of Nevada are dismissed  
11 with prejudice. The State of Nevada is **DISMISSED** from this action.

12 **IT IS FURTHER ORDERED** that the Eighth Amendment claims against defendants  
13 Bannister, Benedetti and Peery in Count I **may proceed**.

14 **IT IS FURTHER ORDERED** that Count II is **DISMISSED** with prejudice.

15 **IT IS FURTHER ORDERED** that Count III is **DISMISSED** with prejudice.

16 **IT IS FURTHER ORDERED** that the Clerk **shall electronically serve a copy of this**  
17 **order, including the attached Intent to Proceed with Mediation Form, along with a copy of**  
18 **plaintiff's complaint, on the Office of the Attorney General of the State of Nevada, attention**  
19 **Pamela Sharp**. The Attorney General shall advise the Court within **twenty-one (21) days** of the date  
20 of entry of this order whether they can accept service of process for the named defendants and the last  
21 known address under seal of the defendants for which they cannot accept service. If the Attorney  
22 General accepts service of process for any named defendant(s), such defendant(s) shall file and serve  
23 an answer or other response to the complaint within **thirty (30) days** of the date of the notice of  
24 acceptance of service.

1                   **IT IS FURTHER ORDERED** that the parties **SHALL DETACH, COMPLETE, AND**  
2 **FILE** the attached Intent to Proceed with Mediation Form on or before **thirty (30) days** from the date  
3 of entry of this order.

4                   **IT IS FURTHER ORDERED** that henceforth, plaintiff shall serve upon defendants, or,  
5 if an appearance has been made by counsel, upon their attorney(s), a copy of every pleading, motion, or  
6 other document submitted for consideration by the court. Plaintiff shall include with the original paper  
7 submitted for filing a certificate stating the date that a true and correct copy of the document was mailed  
8 to the defendants or counsel for defendants. If counsel has entered a notice of appearance, the plaintiff  
9 shall direct service to the individual attorney named in the notice of appearance, at the address stated  
10 therein. The court may disregard any paper received by a district judge or a magistrate judge that has  
11 not been filed with the Clerk, and any paper which fails to include a certificate showing proper service.

12  
13                   DATED this 12th day of July, 2010.

14                     
15                   \_\_\_\_\_  
16                   UNITED STATES DISTRICT JUDGE  
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1 \_\_\_\_\_  
2 Name

3 \_\_\_\_\_  
4 Prison Number

5 \_\_\_\_\_  
6 Address

7 UNITED STATES DISTRICT COURT  
8 DISTRICT OF NEVADA

9 \_\_\_\_\_, ) Case No. \_\_\_\_\_  
10 Plaintiff, )

11 v. ) **NOTICE OF INTENT TO**  
12 ) **PROCEED WITH MEDIATION**

13 \_\_\_\_\_ )

14 \_\_\_\_\_ )

15 Defendants. )

16 This case may be referred to the District of Nevada's early inmate mediation program. The  
17 purpose of this notice is to assess the suitability of this case for mediation. Mediation is a process by  
18 which the parties meet with an impartial court-appointed mediator in an effort to bring about an  
19 expedient resolution that is satisfactory to all parties.

20 1. Do you wish to proceed to early mediation in this case? \_\_\_\_ Yes \_\_\_\_ No

21 2. If no, please state the reason(s) you do not wish to proceed with mediation? \_\_\_\_\_

22 \_\_\_\_\_

23 \_\_\_\_\_

24 \_\_\_\_\_

25 3. List any and all cases, including the case number, that plaintiff has filed in federal or state court  
26 in the last five years and the nature of each case. (Attach additional pages if needed).

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_



1 4. List any and all cases, including the case number, that are currently pending or any pending  
2 grievances concerning issues or claims raised in this case. (Attach additional pages if needed).

3 \_\_\_\_\_  
4 \_\_\_\_\_  
5 \_\_\_\_\_

6 5. Are there any other comments you would like to express to the court about whether this case is  
7 suitable for mediation. You may include a brief statement as to why you believe this case is  
8 suitable for mediation. (Attach additional pages if needed).

9 \_\_\_\_\_  
10 \_\_\_\_\_  
11 \_\_\_\_\_

12 **This form shall be filed with the Clerk of the Court on or before twenty (20) days from the  
13 date of this order.**

14 Counsel for defendants: By signing this form you are certifying to the court that you have  
15 consulted with a representative of the Nevada Department of Corrections concerning participation in  
16 mediation.

17 Dated this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

18 \_\_\_\_\_  
19 Signature

20 \_\_\_\_\_  
21 Name of person who prepared or  
22 helped prepare this document  
23  
24  
25  
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